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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 995

ROSS HOWARD,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

ROSS HOWARD, Petitioner, prays that this Court grant rehearing of its Order of June 16, 1969, denying the Petition for Writ of Certiorari in the above entitled cause, and that a Writ of Certiorari issue to review the Judgment of the Court of Appeals for the Sixth Circuit in the above entitled case as prayed for in the Petition filed January 29, 1969, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. At the time of the filing of the Petition for Writ of Certiorari there was no conflict of decisions on the question sought to be reviewed. Since that time, an implicit conflict has arisen. On February 12, 1969, the Court of Appeals for the Tenth Circuit announced its Decision in *Everett Churchill Nelson* v. *United States of America,* 406 F.2d 1136 reversing the Decision of the district court for the District of Colorado on the point of the sufficiency of a conspiracy indictment brought under 18 U.S.C. 371 (a copy of the opinion of the Court of Appeals for the Tenth Circuit is appended hereto).

2. In the Nelson case, as in the present case, the question before the Court was the sufficiency of a conspiracy indictment. The Tenth Circuit Court of Appeals held that the indictment was not sufficient in that it did not allege unlawful intent of the co-conspirators when an essential element of the substantive offense which was the object of the conspiracy was an allegation of specific intent. The Tenth Circuit Court of Appeals substantively, by its decision, has adhered to a standard in the construction of the sufficiency of indictments which is stricter than that which the Sixth Circuit Court of Appeals applied in measuring the sufficiency of the indictment in the instant cause.

The Sixth Circuit, in apposition to the holding of the Tenth Circuit, has, in the instant cause, construed the conspiracy indictment with greater liberality than that of the Tenth Circuit and further, this Petitioner asserts that the Sixth Circuit's construction of the indictment was in derogation of the mandate set forth by this Court in *Den-*

nis v. *United States*, 384 U.S. 855, 860, 86 S.Ct. 1840, 1843, 6 L.Ed. 2d 973 (1966) where the Court said:

> "indictments under the broad language of the general conspiracy statute must be scrutinized carefully. . . ."

CONCLUSION

For the reasons set forth above and in the Petition for Writ of Certiorari, it is respectfully urged that rehearing be granted and that upon such rehearing, a Writ of Certiorari issue to the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

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Everett Churchill NELSON,
Appellant,

v.

UNITED STATES of America,
Appellee.

No. 52-68.

United States Court of Appeals
Tenth Circuit.

Feb. 12, 1969.

HILL, Circuit Judge.

Appellant Nelson was tried to a jury and convicted of conspiring to transport altered securities in interstate commerce in violation of 18 U.S.C. § 371. The principal issue raised on this direct appeal is whether a conspiracy indictment is rendered fatally defective as a result of the failure to allege an essential element of the substantive offense upon which the conspiracy charge is based.

The indictment charged that the appellant and another named defendant, together with certain coconspirators, "wilfully and knowingly did combine, conspire, confederate and agree together and with each other to commit an offense against the United States, that is to transport or cause to be transported in interstate commerce, altered securities, knowing the same to have been altered in violation of 18 U.S.C. Sec. 2314." A number of overt acts were also specified but the indictment did not allege that the acts were accompanied "with unlawful and fraudulent intent" as is required to sustain a substantive

violation of 18 U.S.C. § 2314.[1] The failure to properly allege the requisite intent prompted appellant to initiate an unsuccessful pre-trial motion to quash the indictment.

As support for the proposition that the indictment must be dismissed, appellant relies upon Robinson v. United States, 263 F.2d 911 (10th Cir. 1959) where an indictment charging a conspiracy to traffic in narcotics was dismissed for failure to aver that the contraband was known to be unlawfully imported.[2] "The instant indictment fails to make this essential allegation and thus fails to state a public offense." Id. at 912. In dissenting, Judge Phillips indicated that inasmuch as the indictment identified the substantive offense which the defendants were conspiring to commit, it adequately apprised them of the charges and should not have been dismissed. This position was based upon the statement in Wong Tai v. United States, 273 U.S. 77, 47 S.Ct. 300, 71 L.Ed. 545 (1957) that the offense which is the object of a conspiracy need not be delineated with the particularity necessary to support a charge premised solely upon a violation of that substantive offense. A number of cases passing upon this question have agreed, often choosing to require little more than a reference to the underlying substantive statute.[3] On the other hand, while espousing the view that

1. E.g., United States v. Salliey, 360 F.2d 699, 701 (4th Cir. 1966); Londos v. United States, 240 F.2d 1, 7 (5th Cir. 1957) cert. denied 353 U.S. 949, 77 S.Ct. 860, 1 L.Ed.2d 858.

2. *Robinson* was followed in the companion case of Burley v. United States, 363 F.2d 912 (10th Cir. 1959); and in Davidson v. United States, 263 F.2d 959 (10th Cir. 1959).

3. United States v. Offutt, 75 U.S.App.D.C. 344, 127 F.2d 336 (1942); Freedman v. United States, 64 F.2d 661 (1st Cir. 1933); United States v. Switzer, 252 F.2d 139 (2d Cir. 1958); Hanks v. United States, 97 F.2d 309 (4th Cir. 1938); Walker v. United States, 342 F.2d 22, 27 (5th Cir. 1965); United States v. Mixon, 374 F.2d 20 (6th Cir. 1967). Indeed, in Stein v. United States, 313 F.2d 518, 521 (9th Cir. 1962), the court expressly rejected

a conspiracy indictment need not unduly particularize the underlying offense, other decisions adhering to the holding in Robinson, have required that the indictment contain an allegation of specific intent where intent is expressly made an element of the offense.[4]

[1-3] In short, while a conspiracy indictment need not allege the underlying offense with the same degree of specificity that is required to charge the offense itself, "indictments under the broad language of the general conspiracy statute must be scrutinized carefully * * *." Dennis v. United States, 384 U.S. 855, 860, 86 S.Ct. 1840, 1843, 16 L.Ed.2d 973 (1966). In conformance with the lessons of Robinson, this scrutiny will be exercised to require an averment of the essential elements upon which the underlying offense rests. In fact, such scrutiny has been exhibited in cases dealing with charges identical to those in the case at bar. There the courts, at least implicitly, indicated that the unlawful intent must be alleged.[5] Such

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Robinson declaring it to be contrary to certain pronouncements of the Supreme Court. The court cited Wong Tai as a case in point. Yet an analysis of the holding in Wong Tai reveals that the indictment in that case, unlike the indictment in Robinson, did contain an allegation that the defendant possessed the requisite guilty knowledge. An examination of additional Supreme Court decisions likewise fails to reveal any direct conflicts. See, United States v. Behrman, 258 U.S. 280, 42 S.Ct. 303, 66 L.Ed. 619 (1922); Thornton v. United States, 271 U.S. 414, 423, 46 S.Ct. 585, 70 L.Ed. 1013 (1926); and Russell v. United States, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962).

4. Wilkins v. United States, 376 F.2d 552, 562 (5th Cir. 1967); United States v. Calhoun, 257 F.2d 673 (7th Cir. 1958); United States v. Chamley, 376 F.2d 57 (7th Cir. 1967). Cf., Gendron v. United States, 295 F.2d 897, 901 (8th Cir. 1961).

5. "The indictment * * * adequately charged that the acts forming the object of the conspiracy were done with the requisite intent." United States v. Chamley, 376 F.2d 57, 59 n. 3 (7th Cir. 1967). In Downing v. United States, 348 F.2d 594 (5th Cir. 1965) the court sustained the indictment against an assertion that it failed to allege that the defendant committed any crime against the United States. "The indictment under which [defendant] was tried substantially follows the language of the statutes involved * * *." Id. at 599. This court upheld an indictment "couched in the language of the statutes purportedly violated." Woodring v. United States, 376 F.2d 619, 621 (10th Cir. 1967).

a requirement, contrary to various statements in some of the decisions discussed above is not a reversion to the prolix indictments of the past, but rather, is wholly in keeping with the purpose of an indictment in apprising the accused of the nature of the charges against him. As we indicated in Davis v. United States, 347 F.2d 378, 379 (10th Cir. 1965), "There is no magic to the words used * * * to allege guilty knowledge." What is demanded, however, is a competent and forthright attempt to notify the accused of the extent of his alleged culpability. The present indictment failed to satisfy this criterion and must be dismissed.

[4] Although the indictment was defective for the aforementioned reason, it is necessary to comment briefly upon the assertion by the appellant that the indictment was also faulty because it was based upon the passing of American Express Money Orders which are not "securities" within the meaning of 18 U.S.C. §§ 2311 and 2314. This contention is grounded upon the fact that although the definition of a "security" is somewhat broad, there is no specific reference to money orders. Nevertheless, it is clear that a money order is an "evidence of indebtedness" and therefore included within the statutory definition.[6]

Certain alleged trial errors have also been argued by the appellant. In view of our dismissal of the indictment, those assertions require no further comment except to note that in the event of a new trial, it is assumed that the trial court will take steps to prevent their reoccurrence.

Reversed with instructions to dismiss the indictment.

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6. Cf., Castle v. United States, 287 F.2d 657 (5th Cir. 1961); McGee v. United States, 402 F.2d 434 (10th Cir. 1968); Kreuter v. United States, 376 F.2d 654 (10th Cir. 1967); United States v. Braverman, 376 F.2d 249 (2d Cir. 1967) cert. denied 389 U.S. 885, 88 S.Ct. 155, 19 L.Ed.2d 182; United States v. Smith, 310 F.2d 121 (4th Cir. 1962); United States v. Nelson, 273 F.2d 459 (7th Cir. 1960).